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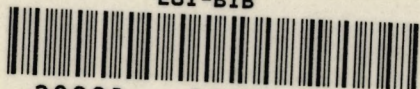
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and the Paradox of Impartiality**

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Habermas, Rawls, and the Paradox of Impartiality*

"Sollen und Sein klaffen bei uns weiter
auseinander als bei anderen, weil eben
das Sollen sehr hoch gesetzt ist."
-- Thomas Mann, Doktor Faustus

The social and political life of contemporary western societies has been increasingly characterised by conflicts over values. Instances of this tendency are conflicts involving religious sects, homosexuality, feminism, youth subcultures, abortion, AIDS, ecological protection, urban development, and school protests by parent associations. Political sociology has addressed this question with conceptual tools such as postmaterialism (Inglehart), new social movements (Raschke, Offe), civic culture (Alman and Verba) or postmodernism (Baudrillard). Rather than contributing to this debate, our aim is to look at these value conflicts from the viewpoint of moral and political philosophy and its project of a theory of justice adequate to the task of the regulation of interpersonal conflict in these societies. This orients our path of investigation towards how such theories address questions of right and wrong arising from these conflicts. We compare, for example, whether the demands put forward by members of a fundamentalist religious sect or of an ecological group will be judged to be right or wrong; "right", in the sense that they are

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allowed fulfilment within the democratic constitutional state, and "wrong", in the sense that they are disallowed.

This form of comparison is motivated by the perception of the many similarities between such movements. Claus Offe¹ has characterised "new social movements" as enforcing no division between the public and private roles of their members, as advancing demands on the basis of principled value-systems defining relations to other political actors in terms of sharp oppositions such as "us and them", "victory or defeat", "now or never" -- oppositions which place them in positions not open to negotiation. But this also seems to be the case for religious movements. Offe distinguishes "new social movements" from "socio-cultural movements" such as religious fundamentalism, on the basis that the latter do not seek to bind the social whole to their demands should they be successful, and the fact that they are prepared to retreat to the domain of the private if they be unsuccessful. But the experiences of evangelical T.V. preaching, battles over arts and literature censorship, abortion or sexual practices motivated by religious sects at the level of challenges to legislation binding the whole citizenry, point against the empirical finding of "withdrawal". The issue of how justice is to differentiate between these types of movements remains. And it becomes all the more pressing once we consider that the increasing mobility within the world-society promises not only a greater degree of multi-culturalism, but

¹ "Challenging the boundaries of institutional politics: social movements since the 1960s" in Charles S. Maier, ed., *Changing Boundaries of the Political* (Cambridge: Cambridge University Press, 1987), pp.71-105.

also a greater degree of value conflict between the multiplicity of cultural groupings.

In addressing this question we invoke the important role of intuition in moral and political philosophy. It is our intuition that moral and political philosophy -- like many other disciplines -- have to cope with paradoxes which arise from the processes of its conceptual development. According to Quine, a paradox is a conclusion that at first sight appears absurd, but which has an argument to sustain it. The apparently absurd conclusion "packs a surprise, but it is seen as a false alarm when we solve the underlying fallacy"². Since a fallacy is simply an invalid form of argument³, such paradoxes may be resolved by tracking down the fallacy in the argument. However, when confronted with the special form of paradox called "antinomy", we have no such easy way out. Here the resolution must come through conceptual innovation, a new way of looking at the matter that generates the paradox⁴.

Standing in the Kantian tradition, John Rawls and Jürgen Habermas have both sought to construct a theory of justice

² W.V.O. Quine, *The Ways of Paradox and other Essays* (Cambridge MA: Harvard University Press, 1966), p. 9.

³ Cf. J.L. Mackie, "Fallacies" in *Encyclopedia of Philosophy*, vol. 3, ed. P. Edwards (London: Macmillan, 1967), p.169.

⁴ Cf. Fletcher, "Paradoxes in Legal Thought", 85 *Columbia Law Review*, 1985, p. 1263. There is a considerable body of literature on this topic. See also Niklas Luhmann, "The Third Question: The Creative Use of Paradoxes in Law and Legal History" in *Journal of Law and Society* 15 (1988), pp.153-165; Gunther Teubner, *Recht als autopoietisches System*, (Frankfurt: Suhrkamp, 1989), Ch. 1; Michael Walzer, *Interpretation and Social Criticism*, (Cambridge: Harvard University Press, 1987), pp 31-32.

capable of effecting impartial judgments between citizens of the democratic constitutional state. According to both theorists, impartial judgment - the sustained commitment to the idea of the "rule of law" - provides the basis of legitimate political and judicial authority. It does so on the basis that the right does not commit itself to a particular conception of the good, and, in so far, is acceptable to all citizens as impartial to their individual value-systems. A paradox emerges when the impartial regulation of a conflict stemming from the radically diverse value systems of the conflicting parties requires the rejection of one of these value systems from the democratic state. From the standpoint of the theory of justice, the paradox is resolved through the claim that the theory of justice *is* in fact impartial. But if the theorist is to avoid a self-referential claim to legitimacy, he must remove the paradox to the level of addressing the question of *why* impartiality is impartial. Here, the legitimacy of restricting a value system's existence relies on how successfully theorists such as Rawls and Habermas can prove the impartiality of impartiality without reference to the standpoint of ... impartiality.

In this paper we enter the structural paradoxes of both theories by comparing the principles of justice used by Rawls and Habermas to make an impartial (and hence legitimate) distinction between a case of "civil disobedience" and a case of "intolerance" (Rawls) or "pathology" (Habermas). For Rawls, the category of civil disobedience marks the point where a theory of justice moves from the norms of justice characterizing the non-ideal "state of near justice" towards the

norms of justice characterizing the "just society"⁵. Habermas in turn, takes civil disobedience as an important "limiting case" indicating how argumentations for the validity of proposed norms can sometimes "burst open the very legal form in which [such argumentation procedures] are institutionalized" in the democratic constitutional state⁶. The category of civil disobedience therefore functions as a type of filter mechanism through which the *acceptance or rejection* of new norms fulfils the promise of an impartial protection of pluralism. It thus provides the cutting edge of the distinction drawn from the standpoint of the right over various concepts of the good.

1 Distinguishing protest actions: Attributing difference to identity?

Let us assume two cases of protest action which produce acts relevant for the consideration of a legal system in a Western constitutional democracy. In both cases the acts bear the narrow, *prima facie* legal description of the "partial occupation of", and the "obstruction of passage upon" public property (the site may be an administration office, a school, a public gallery, a hospital). The tribunal characterizes the acts as identical and illegal.

⁵ *A Theory of Justice* (Oxford: Oxford University Press, 1972), hereinafter cited as *TJ*, pp.391, 351, 363.

⁶ "Law and Morality", *The Tanner Lectures on Human Values* vol. VIII, ed. M. McMurrin (Cambridge: Cambridge University Press, 1988), p.278 (cited as "Law and Morality").

The identity of the two cases may be broken should the protesters in one case convince the tribunal to so contextualize their illegal acts, as to distinguish their case as a case of "*civil disobedience*". In most liberal democratic theories of justice, the category of civil disobedience has normative force in so far as it trumps the initial distinction of "legal" versus "illegal" through the introduction of a further distinction of "legitimate" versus "illegitimate". By virtue of this distinction, acts considered under the category of civil disobedience may be characterized as illegal but nevertheless legitimate due to their appeal to a principle of justice not reducible to the self-referential legality of positive law. We have referred to the general, normative "filter mechanism" function of this category above. The filtering begins by offering agents of acts of civil disobedience more favourable treatment with respect to the prosecution of their acts, and the probability and degree of their sentencing⁷.

Should we attempt a "thicker" description of the acts of occupation and obstruction so as to examine whether one of these cases might be distinguished as a case of civil disobedience, we might imagine the possibility of a continuing identity: In both cases, the acts have been planned by community groups to protest government legislation. They are "symbolic" in so far as permanent occupation and obstruction are not defined as political ends. No ownership claim is being

⁷ It goes without saying that public recognition of the category of "civil disobedience" would also gradually affect the initial probability of arrest. An extensive review of the literature on "civil disobedience" is offered by Günther Frankenberg, "Ziviler Ungehorsam und Rechtsstaatliche Demokratie" *Juristenzeitung* (1984), pp.266-275.

made to the public property. Furthermore, the protesters have stated their arguments in media interviews aimed at persuading the public of their viewpoint, and have claimed that they shall desist from their strategy of occupation and obstruction only upon the repeal of the legislation. They submit to police arrest peacefully. On trial, both groups establish that they are not protesting the legislation on the level of its "wisdom", or its appropriateness for the achievement of otherwise uncontroversial public goal or value. On the contrary, they argue that the legislation is "immoral" because it misconstrues an existing public value in a way that threatens the existence of another value to which they attribute the same public character⁸.

Now, if we are to imagine that the roles of these two parties are to be filled by a religious fundamentalist group, and by a so-termed "new social movement" such as an ecological movement, we would probably find that in both theories of justice proposed by Rawls and Habermas, the former would be placed in the category of intolerance/social pathology, while the latter would be treated as a case of civil disobedience. This would have the effect of giving the ecological protestors the leniency of treatment requisite to an inclusion of their

⁸ The distinction drawn between the two levels of claim below, is broadly based on Dworkin's distinction between "justice-based" and "policy-based" civil disobedience in Ronald Dworkin, "Civil Disobedience and Nuclear Protest" in *A Matter of Principle* (Cambridge MA: Harvard University Press, 1985), pp.104-116. As Dworkin indicates many cases of policy-based disobedience are potentially reducible to the non-existence or division of expert opinion regarding the effects of alternative policy options. Although these cases involve interesting questions as to the adjudication of mutually exclusive, or rival but inadequate epistemological claims, they shall not concern us here.

proposed norm of justice in the principles of justice regulating the democratic constitutional state.

To uphold a distinction between what hitherto appear to have been identical cases on the basis that one group of protesters makes a claim to a "legitimate" principle of law while the other does not, would be *prima facie* against the commitment to the "rule of law" which commands that like appeals to the same legal principle be treated impartially⁹. Those who would wish to simultaneously defend impartiality *and* employ the category of civil disobedience to distinguish between these two cases, must accept the onus of proving where the difference lies. And to satisfy the self-imposed requirement of impartiality, the philosopher's distinction between an "illegal but legitimate" act and an "illegal and illegitimate" act must *itself* be shown to be ... legitimate¹⁰. The onus of proof has been accepted. Habermas has claimed that:

Those who, for normative reasons, wish to delineate legality from legitimacy must of course be in a position to

⁹ For the commitment to the "rule of law", see *TJ*, s.38; Habermas, "Law and Morality", and "Towards a Communication-Concept of Rational Collective Will-Formation. A Thought Experiment" in *Ratio Juris* 2 (1989), pp.144-154 (cited as "Towards a Communication-Concept...").

¹⁰ Niklas Luhmann describes this argumentational move as the application of a binary code to itself. In this case, the legal system's binary code of "right" versus "wrong" which underlies the basis of the first distinction "legal" vs. "illegal", is applied yet again to itself in the form of the "legitimate" vs. "illegitimate" distinction. The question now posed by Luhmann is the "third question" which arises upon repeating this manoeuvre at the level of the "legitimate" vs. "illegitimate" distinction: "How can we rightly or wrongly differentiate the right and the wrong?" Niklas Luhmann, "The Third Question", *op.cit.*, p.155.

distinguish those legitimating constitutional principles which are based in sound reasoning and *deserve* recognition¹¹.

And although Rawls does not use the words "legitimate" or "legitimacy", he too argues for the ability to recognize and distinguish a category of legally relevant acts which "expresses disobedience to the law within the limits of fidelity to the law, although it is at the outer edge thereof"¹². For Rawls, it is

no doubt ... possible to imagine a legal system in which conscientious belief that the law is unjust is accepted as a defence for non-compliance. Men of great honesty with full confidence in one another might make such a system work¹³.

2.1 Rawls: "Primary goods" and "appropriate" claims to justice"

Under Rawls' formula for civil disobedience, illegal acts fall under the category of civil disobedience when they express underlying fidelity to law, a non-violent character and when their agents are willing to accept the consequences of their conduct (eg. by submitting to arrest)¹⁴. Further, the acts must have a "symbolic" and "public" character in that they "are not grounded solely on group or self-interest", but rather "address

¹¹ Jürgen Habermas, "Civil Disobedience: Litmus Test for the Democratic Constitutional State" in *Berkeley Journal of Sociology* 30 (1985), pp.95-116, p.102, hereinafter cited as "Litmus Test".

¹² John Rawls, *TJ*, p.367.

¹³ Rawls, *TJ*, p.367. It is significant that Rawls qualifies his faith in the capacity to raise this plea by immediately adding: "But as things are, such a scheme would presumably be unstable even in a state of near justice. We must pay a certain price to convince others that our actions have, in our carefully considered view, a sufficient moral basis in the political convictions of the community" (*Ibid*).

¹⁴ The following account is a reconstruction of the category of "civil disobedience" based on *TJ*, pp. 55-59. Since his *magnus opus*, Rawls has made no extensive statement of his position on "civil disobedience".

the public's sense of justice". All these conditions are met by the examples we have suggested above¹⁵. Where a difference in the two cases *might* emerge upon a Rawlsian interpretation, is in the appeal both parties would make to the principles of political justice¹⁶.

In *A Theory of Justice*, Rawls states that an agent may successfully claim to be acting within the framework of civil disobedience if he or she supports the claim by appeal to the "principles of justice which regulate the constitution and social institutions generally", and *not* to "principles of personal morality or to religious doctrines", though, as Rawls concedes, "these may coincide with and support one's claims"¹⁷. In the later articles, Rawls specifies the way in which claims may be supported so that a distinction may be enforced between "*appropriate*" (i.e. legitimate) claims and "*inappropriate*" (i.e. illegitimate) claims¹⁸.

¹⁵ Rawls' further condition that "civil disobedience" be an avenue of "last resort" after "normal appeals to the political majority have already been made in good faith and that they have failed" (*TJ*, p.373) could easily be implied for both our examples.

¹⁶ To recall the two principles of justice: (1) Each person has an equal right to the most extensive scheme of equal basic liberties compatible with a similar scheme of liberties for all. (2) Social and economic inequalities are to satisfy two conditions: they must be (a) to the greatest benefit of the least advantaged members of society, and (b) attached to offices and positions open to all under conditions of fair equality of opportunity.

¹⁷ *TJ*, p.365.

¹⁸ John Rawls, "Social Utility and Primary Goods" in Amartya Sen & Bernard Williams, ed., *Utilitarianism and Beyond* (Cambridge: Cambridge University Press, 1982), pp.159-185., pp.161ff, pp.172-3 (hereinafter "SUPG"); and John John Rawls, "The Priority of Right and the Ideas of the Good" in *Philosophy and Public Affairs* 17 (1988), pp.251-276., pp.159-185., pp.255-257 (cited as "PRIG").

"Appropriate" claims are supported by the fact of their reference to a list of "*primary goods*". In the "well-ordered society", all citizens affirm the same political conception of themselves as free and equal persons. In so doing, they recognize that their respective conceptions of the good - however distinct - require for their advancement roughly the same primary goods. The index of primary goods springs forth from the intuitive idea of society as a "fair system of cooperation" and aspires to achieving an "overlapping consensus" on a political conception of justice in a Western constitutional democracy¹⁹. It is important to note that the list is composed of those goods which would allow the realization of the "two powers of moral personality", namely "the capacity for a sense of right and justice, ... and the capacity to decide upon, to revise and rationally pursue a conception of the good" in a "life-plan"²⁰. The primary goods are therefore as follows:

- (a) Basic rights and liberties; eg. freedom of thought and liberty of conscience, freedom of association, the freedom defined by the liberty and the integrity of the person, as well as by the rule of law; and finally political liberties.
- (b) Freedom of movement and choice of occupation against a background of diverse opportunities.
- (c) Powers and prerogatives of offices and positions of responsibility, particularly those in the main political and economic institutions.

¹⁹ "SUPG", p.164; "PRIG", pp.275-276. In all writings since "Justice as Fairness, Political not Metaphysical", *Philosophy and Public Affairs* 14 (1985), pp.223-251, and "The Idea of an Overlapping Consensus", *Oxford Journal of Legal Studies* 7 (1987), pp.1-25, (hereinafter cited as "OC"), Rawls has explicitly defended himself against charges of a metaphysical concept of justice by holding his concept of justice to be "political", and founded in the "practical political possibilities" of Western constitutional democracies. (Particularly in "OC" pp.24 & 3, and "JFPM", p.223).

²⁰ John Rawls, "SUPG", pp.164-165, "PRIG", p.270.

- (d) Income and wealth.
- (e) The social basis of self-respect²¹.

Cases of civil disobedience raise claims to justice that are *prima facie* "inappropriate" due to their failure to make reference to a good which is already part of the list of primary goods. A successful claim to civil disobedience would attempt to extend the list either by adding a newly-proposed good to it, or by reinterpreting one of the existing items so as to cover the claim to the new good. Rawls recognizes that "if necessary the list of primary goods can in principle be extended", subject to the condition that the proposed primary goods accord with the considerations which have characterized the selection of the existing goods²².

Conflicts of value - and not of interest - usually involve reference to either items (a) or (e) of the primary goods list. Liberalism's traditional emphasis on item (a) - the basic rights and liberties - enables groups capable of phrasing their claims for justice within the form of "basic rights for individual citizens" a relatively easy path to an "appropriate" claim to justice. An ecological protest group might well argue the basic right to a "sound environment" on the basis that every citizen requires clean air and water to live life according to his or her own conception of the good. This would grant it an "appropriate" claim to justice, and a passage to the category of "civil disobedience".

²¹ "SUPG", p.162 and "PRIG", p.257.

²² "PRIG", p.257 & *ibid*, fn.7.

Religious fundamentalists, are more likely than not to raise claims for basic rights which stem from, or are required by, their religious doctrines. Rawls regards such appeals as "inappropriate" due to their reference to "general and comprehensive moral doctrines", which he defines as follows:

A conception is said to be general when it applies to a wide range of subjects (in the limit of all subjects); it is comprehensive when it includes conceptions of what is of value in human life, ideals of personal virtue and character, and the like, that are to inform much of our non-political conduct. There is a tendency for religious and philosophical conceptions to be general and fully comprehensive; indeed their being so is sometimes regarded as an ideal to be realized.²³

To incorporate value concepts derived from general and comprehensive moral doctrines into the principles of justice (and hence the list of primary goods) is to render the institutions of justice "sectarian", thereby cancelling the citizenry's equal access to liberty²⁴. A commonly raised fundamentalist argument for the protection of the value of family would be "inappropriate" - despite considerable support for the importance of the family in Rawls' conception of psychological development²⁵ - if it is argued on the basis of religiously sanctioned family role-models. If the "family" were to be included in a revised list of primary goods, the liberal approach would be to define it through its protective and

²³ "PRIG", pp.252-253. See also "OC", p.3. fn.4. In fact, Rawls always illustrates "general and comprehensive doctrines" by reference to religious doctrines.

²⁴ See eg. "OC", pp.2-5, 16-17.

²⁵ Rawls' idiosyncratic view of family role models is unexpectedly conservative, eg. the role models of "good wife and husband", "good son" and so on. See *TJ*, p.467-8.

moral associative *functions*, rather than by its specific constitution (as some religious fundamentalists would have it, eg. *pater familias* as bread-winner and protector, wife and mother remaining by the hearth). This would be in accordance with the liberal commitment to providing a structural equality of opportunity between individual members of the "just society".

Should protesters raising "inappropriate" claims to justice persist in their claim in ways that would cancel other citizens' rights, eg. by cancelling their right to freedom of movement, or conscience, by blocking their entrance to schools or art galleries (rights which in the last analysis go to the stability of a liberal society's basic institutions), their activities may be legitimately suppressed as the actions of an "intolerant sect"²⁶. On this basis they are distinguished from the agents of acts of civil disobedience. It is significant to note that the use of the category of intolerance to restrict the protest group's pursuit of its conception of the good is said to be legitimate on the ground of the priority of the principles of justice (the right) to the sectarian conception of the good. It is assumed that the group's members would - either in the "original position", or, as the later Rawls prefers, through "a public understanding about the claims it is appropriate for citizens to make when

²⁶ Rawls notes that "while an intolerant sect does not itself have the title to claim of intolerance, its freedom should be restricted only when the tolerant sincerely and with reason believe their own security and that of institutions of liberty are in danger...It is only the liberty of the intolerant which is to be limited, and this is done for the sake of equal liberty under a just constitution the principles of which the intolerant themselves would acknowledge in the original position" (*TJ*, p.220). On the requirement of stability for the system of justice, and stability as a political end, see *TJ*, p.6, 177-182, 240, 337, 496-504; "JFPM", pp.249-251; "OC", pp.11-12, 22.

questions of political justice arise ... [and] how such claims are to be supported"²⁷ (i.e. the primary goods thesis) - *themselves* accept the legitimacy of the principles under which their liberty is to be limited. But it is precisely this assumption, the assumption that religious fundamentalist communities would sacrifice the core commitments that go towards their self-definition and integrity (that which Rawls assigns to the sphere of the private) to give priority to the right (the public) which seems questionable. The public-private distinction cannot be assumed of religious communities, nor can their commitment to a system of justice - based on the relatively impersonal structure of the nation-state - which would regularly classify value claims stemming from their religion as "inappropriate". To this extent, critics such as Bernard Williams have pointed out that the public understanding of moral personality in Rawls' theory comports poorly with the nature of non-public aims and attachments²⁸, while William Galston has indicated that for those excluded from the liberal society, "it is hard to see how liberalism can be experienced as anything other than an assault. Resistance is therefore to be expected, and it is far from clear on what basis it is to be condemned"²⁹.

²⁷ "PRIG", p.255.

²⁸ See Bernard Williams, "Person, Character and Morality" in *The Identity of Persons*, ed. Amelie O. Rorty (Berkeley: University of California Press, 1976), pp.210 & 215.

²⁹ William Galston, "Pluralism and Social Unity" in *Ethics* 99 (1989), pp.711-726, p.718. The problem of strong religious views for the Rawlsian theory of impartiality, is dealt with by Thomas Nagel in "Moral Conflict and Political Legitimacy", *Philosophy and Public Affairs* 16 (1987), pp.215-240.

Attempting to accomodate this type of criticism, Will Kymlicka has recently defended liberalism on the basis of an expansion of the basic liberal rights and liberties to include the right to cultural membership. According to Kymlicka, the fact that cultural membership has not been recognized by liberal theorists as a primary good is simply because "Rawls and Dworkin, like most post-war political theorists, work with a very simplified model of the nation-state, where the political community is co-terminous with one and only one cultural community"³⁰. Once this conflation is corrected, cultural membership may be placed within a liberal index of primary goods through an argument based on item (e) of Rawls' list of primary goods, i.e. the social basis of self-respect, and the capacity to form a rational life-plan.

For Rawls, self-respect is equated with "the sense that one's plan of life is worth carrying out". It follows that the individual's capacity to decide upon, to revise and rationally pursue a conception of the good in a life-plan is only achievable through structural processes that encourage these possibilities. Kymlicka grants this argument a cultural background:

The processes by which options and choices become significant for us are linguistic and historical processes. Whether or not a course of action has any significance for

³⁰ Will Kymlicka, *Liberalism, Community and Culture* (Oxford: Clarendon, 1989), p.177. According to Kymlicka, "a political community may be co-extensive with one cultural community, as is envisaged in the 'nation-state'...but the two forms of community may not coincide: the political community may contain two or more groups of people who have different cultures, speaking different languages, developing different cultural traditions. This is the situation in multinational, or culturally plural, states, and these form the majority of the world's states" (*Ibid*, p.135).

us depends on whether, or how our language renders vivid to us the point of that activity. And the way in which language renders vivid these activities is a matter of *cultural heritage* ... In order to make ... judgements [about how to lead our lives], we do not explore a number of different patterns of [activity], which might in principle be judged from any cultural structure. Rather we make these judgments precisely by examining the cultural structure, by coming to an awareness of the possibilities it has, the different activities it identifies as significant.³¹

Patterns of activity are only said to become significant through "a rich and secure cultural structure" whose narratives "offer alternative models and roles" some of which - those that strike us as "worth living (which may, of course, include the roles we were brought up to occupy)" - we come to adopt³². The absence of these structures debilitates persons from such life-plans. Arguing the case of the Inuit Indians of Canada, Kymlicka points out that the undermining of their culture by "mainstream" Canada has meant that Inuit "children and adolescents lack adequate role-models, which [has lead] to despondency and escapism"³³.

Kymlicka's argument would appear to bring the claims of many religious fundamentalist groups as to issues regarding censorship and "unnatural sexual practices" within the ambit of item (e) of the primary goods list, thus narrowing the gap of appropriate/inappropriate claims in the examples of protest

³¹ *Ibid*, p.165 (emphasis added).

³² *Ibid*, p.165.

³³ *Ibid*, pp.165-166. Kymlicka cites evidence by A. Seltzer: "Acculturation and Mental Disorder in the Inuit" in *Canadian Journal of Psychiatry* 25 (1980).

activity we have discussed. But the "right to cultural membership" is advanced on the following proviso:

The primary good being recognized [in cultural membership] is the cultural community as a context of choice, not the character of the community or its traditional ways of life, which people are free to endorse or reject³⁴.

It is claimed that in assessing claims to cultural membership we must distinguish between:

(1) what goes to the "stability of a cultural community", where "culture" is defined in terms of "the existence of a viable community of individuals with a shared heritage (language, history etc)", that which, according to Kymlicka's argument, establishes *the cultural community as a structure of choice*; and,

(2) the "character of the [cultural] community or its traditional ways of life" at "a particular moment", where "culture" is defined in terms of "the norms *currently* characterizing it, so that, by definition, any significant change in people's religious affiliations thereby 'destroys' the old 'culture'"³⁵.

It would therefore be an "abuse" of the right to cultural membership to use the argument from the "social basis of self-respect" to protect (2) rather than (1). We are reminded that both Lord Devlin and Iranian fundamentalists have committed this abuse by arguing -- "inappropriately" -- that without restrictions on the freedom of sexual practices (Devlin) or freedoms of sexual practice, religion, press, and speech (Iranian

³⁴ *Ibid*, p.172.

³⁵ *Ibid*, p.168, (emphasis added) and pp.168-176, 196-199.

fundamentalists), their respective cultures would disintegrate thus undermining the self-respect of their members³⁶.

Given that most religious fundamentalist communities claim that the good has already been indicated to them by an external source -- their religion -- which has defined such issues as family role models, sexual practices and cosmological orientations (eg. belief in "creation" instead of "evolution") as the modes for its achievement, it is not immediately obvious that what goes to the "stability" of a culture is capable of being formulated on the basis of the (liberal) principle of free choice. The processes of alternative role-model consideration and life-plan revision envisaged by Rawlsian liberalism are alien to a life which is lived according to "givens" which have not, are not, and ought not (according to their self-referential logic) ever be *chosen*. Indeed, as Galston has noted, fundamentalists "might well declare that the best human life requires the capacity to receive an external good (God's truth) rather than to form a conception of the good for oneself, and to hold fast to that truth once received rather than to revise it"³⁷. Furthermore, whereas it might be possible to distinguish, in a

³⁶ *Ibid*, p.168. In *The Enforcement of Morals* (London: Oxford University Press, 1965), Devlin argued against the liberalization of English homosexuality laws on the basis of the protection of public morality. Kymlicka claims that it is "wildly implausible to suppose that allowing individuals freedom of religion or sexual practices would lead to the breakdown of that community, be it England or Iran". (*op.cit.*, p.168). But it is telling that after a book-long argument on the protection of minority cultures (eg. American Indians), Kymlicka draws upon the protection of the majority culture in England as an example. (Whether the structures of Iranian society would break down or not, when subjected to the challenge of liberalization, is open to speculation).

³⁷ Galston, "Pluralism", *op.cit.*, p.714.

sociological analysis (and should uncontroversial time-frames and cohort analysis figures be found), certain stable features of a culture from its more transitory ones, it is not obvious that within fundamentalist religious communities issues such as religious belief, family structure and sexual practices would belong to the latter category. Rather, it seems that they are the core stabilizing values of such communities.

If we are to review Rawls' distinction between acts of intolerance and acts of civil disobedience, we notice that it relies on the ability to draw the distinction between admissible and inadmissible claims legitimately. To establish the legitimacy of the right, Rawls relies on a legitimate distinction between political conceptions of justice (admissible) and general and comprehensive conceptions of justice (inadmissible). But this distinction is again deontological, for it is only from within the right-as-the-political conception of justice that the distinction may be drawn. Kymlicka, recognizing the shortcomings of traditional liberal individualist methodology takes us one distinction further: he de-emphasises the distinction between political and comprehensive doctrines, but in turn requires a legitimate distinction between factors going to the stability of a culture, and factors relating to its contemporary character in order to legitimate the admissible/inadmissible distinction. At no stage in this process is the question of legitimacy unequivocally resolved. Kymlicka brings us perhaps closer to the rationale of this process. Addressing his own addition to the history of liberal distinctions, he claims that

To reject the possibility of making this distinction is not simply to give up the possibility of defending minority

rights within liberalism, it is to give up the possibility of defending liberalism itself³⁸.

But if the defence of this brand of liberalism is only justified as its own end, the call to the barricades fails to convince. We turn rather to the source of this conceptual innovation in the structural paradox of liberal impartiality.

2.2 *"Incommensurability" and the Liberal Paradox*

Through our review of the distinction between a case of civil disobedience and a case of intolerance, we have noted that the legitimacy of the distinction is established upon the assumption that both parties to the conflict - the public prosecutor and the protest group - accept the *priority* of the Rawlsian principles of justice ("the right") to any particular conception of "the good". But since conflicts of this type involve disagreements about the very nature of the right, this assumption involves a paradox in the construction of the argument for the priority of the right. On the one hand, we are lead to believe that, notwithstanding the differences in their concepts of the good, citizens are capable of reasoning *from within* their individual general and comprehensive doctrines *towards* a list of primary goods which grounds an overlapping consensus on a political concept of justice:

Since we assume each citizen to affirm some such view [viz. religious, philosophical or moral view] we hope to make it possible for all to accept the political conception as true or

³⁸ *Ibid*, p.169.

reasonable, from the standpoint of their own comprehensive view, whatever it may be³⁹.

On the other hand, we are reminded that "justice is prior to the good in the sense that it limits the *admissible* conceptions of the good, so that those conceptions the pursuit of which violate the principles of justice are ruled out absolutely"⁴⁰.

Now, if certain concepts of the good are to be ruled out (no less than absolutely) by the right, which is itself said to *have been affirmed* from within these various concepts of the good, how may the right be said to be *prior* to the good? The question is perhaps more familiar to us in the form "How can the chicken come before the egg ... when the egg comes before the chicken?"

Two resolutions of the paradox of the priority of the right offer themselves for consideration: an argument from temporal priority, and an argument from logical priority. In *A Theory of Justice* the priority of the right seems to involve both temporal and logical arguments. The original position is said to enable its parties

to be impartial, even between persons who are not contemporaries but who belong to many generations. Thus to see our place in society from the perspective of this position is to see it *sub specie aeternitatis*: it is to regard the human situation not only from all social but also from all temporal points of view⁴¹.

³⁹ "OC", p.13, and sec. V *passim*.

⁴⁰ "SUPG", p.194 (emphasis added).

⁴¹ *TJ*, p.587.

The original position is thus both *a process* which involves a "certain form of thought and feeling that rational persons [could] adopt within the world"⁴², and *a thought position* which stands outside historical time in so far as it enables the perception of the diversity of conceptions of the good in human society to be carried out *sub specie aeternitatis*. The ordering of the right over the good achieved from the "standpoint of eternity" is thus introduced into the dimension of historical time as a *fait accompli*⁴³.

Rawls has now abandoned the argument for the priority of the right in the "standpoint of eternity" due to criticisms of transcendentalism⁴⁴. He now conceives the priority of the right over the good to refer to the result of a process of reflection on justice which refers to, and occurs within, defined spatio-temporal parameters. The priority of the right is now the justification for the principles which effect the task of interpersonal comparisons required of a system of justice in

⁴² *Ibid.*

⁴³ The flexibility permitted by Rawls' principle of "reflective equilibrium" (*TJ*, pp.48-51) only allows for the adjustment of the right upon the clearing up of "distortions" or "irregularities" in our "considered judgments" as citizens. It involves no challenge to the actual ordering of the good and the right.

⁴⁴ Summary statements of the major "communitarian" critiques by Charles Taylor, Michael Walzer, Michael Sandel and Alasdair MacIntyre are offered by Amy Gutman, "Communitarian Critiques of Liberalism" in *Philosophy and Public Affairs* 14 (1985), pp.308-322, Stephen Mulhall in "The Theoretical Foundations of Liberalism" in *European Journal of Sociology* 28 (1987), pp.269-295, and Allen E. Buchanan, "Assessing the Communitarian Critique of Liberalism" in *Ethics* 99 (1989), pp.852-882. For a concise exposition of the "shifts" in Rawls' thinking see Richard J. Arneson's "Introduction" to the "Symposium on Rawlsian Theory of Justice: Recent Developments" in *Ethics* 99 (1989), pp.695-710 at pp.696-699 and William Galston, "Pluralism...", *op.cit.*

the "historical and social conditions of modern democratic societies"⁴⁵. These conditions are:

- (i) the fact of pluralism;
- (ii) the fact of its permanence;
- (iii) the fact that this pluralism can be overcome only by the oppressive use of state power;
- (iv) the condition of moderate scarcity; and
- (v) the possibility of gains from well-organized social cooperation.

The recognition of the conditions of pluralism [(i)-(iii)] is therefore a *necessary condition* not only for the definition of the right, but also for its normative force, i.e. that which grants it the power to legitimately distinguish between conceptions of the good which raise "admissible" claims and those conceptions of the good which raise "inadmissible" claims⁴⁶.

It would therefore seem reasonable to ask how the fact of pluralism is understood in *political* terms. Rawls' answer takes the form of claiming that a workable conception of justice

must allow for a diversity of general and comprehensive doctrines, and for the plurality of conflicting, and indeed *incommensurable*, conceptions of the meaning, value and purpose of human life (or what I shall call for short

⁴⁵ "OC" p.22. Although the circumstances of justice are a fundamental assumption of the Rawlsian opus, their explicit historicization has only occurred in the later articles. See eg. comments by William Galston, "Pluralism...", *op. cit.* and Jean Hampton, "Political Philosophy...", *op. cit.* The following list is based on the exposition in "OC", p.22.

⁴⁶ That this condition is necessary is in accordance with Rawls' dictum that "political philosophy is related to politics because it must be concerned, as moral philosophy need not be, with *practical political possibilities*" ("OC", p.24, emphasis added).

'conceptions of the good') affirmed by the citizens of democratic societies⁴⁷

The use of the notion of the "incommensurability" of the conceptions of the good to describe the circumstances of justice is significant. Although Rawls seems to hesitate with respect to the precise meaning of incommensurability, he allots the concept a key position in his theory. In the footnote to the passage above, he holds that:

It is a disputed question whether and in what sense conceptions of the good are incommensurable. For our purposes here, incommensurability is to be understood as an aspect of the fact of pluralism: namely, the fact that there is no available political understanding as to how to commensurate these conceptions for settling questions of political justice⁴⁸.

In an earlier article, Rawls asks us to conceive of the circumstances of justice in terms of a society where two opposing groups regard each other's way of life "with distaste and aversion, if not contempt". The groups are said to have "conceptions of the good [which] are *incommensurable* because their final ends and aspirations are so diverse, their specific content so different, that no common basis for judgment can be found"⁴⁹. We identify this position as Rawls' "*social premise*" of *incommensurability*.

⁴⁷ "OC", p.4. (emphasis added). The footnote to this passage is reproduced below.

⁴⁸ "OC", p.4, fn.6.

⁴⁹ "SUPG", pp. 179-180 (emphasis added).

"Incommensurability" in science⁵⁰ and in ethics has been the subject of considerable scholarship. In the context of ethics, Steven Lukes has attempted to systematize the concept in the following definition:

Two items I_1 and I_2 are incommensurable if and only if, in respect of a given variable F , I_1 is neither superior nor inferior to I_2 , nor are they equal in value⁵¹.

The incommensurability of values may therefore be said to denote the absence of a scale upon, or a medium through which values may be ranked. As such, it has been recognized by a number of thinkers in the Anglo-American tradition⁵². Bernard Williams has claimed that there is no "common currency" in which certain "gains and losses of value can be computed, that values, or at least the most basic values, are not only plural, but in a real sense incommensurable"⁵³. Thomas Nagel has referred to the "fragmentation of value" at its source. Having identified five types of value that give rise to basic conflict, Nagel holds that their motivation can be traced to either agent-centered or outcome-centered motivational viewpoints, both of which are "fundamentally

⁵⁰ The debate between Feyerabend, Putnam etc.

⁵¹ Cited from Steven Lukes, "Incommensurability in Science and Ethics" (European University Institute: unpub. MS, 1989), p.2; Joseph Raz offers a similar definition in *The Morality of Freedom* (Oxford: Clarendon, 1986), pp.322 & 325.

⁵² For a recent survey see Lukes *op.cit.*, pp. 9-11 and his "Making Sense of Moral Conflict" in *Liberalism and the Moral Life* ed. Nancy Rosenblum, (Cambridge MA: Harvard University Press, 1989), from which some of the following examples are drawn.

⁵³ Bernard Williams: "Conflicts of Values" in *Moral Luck* (Cambridge: Cambridge University Press, 1981), pp.76-77.

irreducible to a common basis"⁵⁴. Charles Larmore has also accepted the multiplicity of the sources of value and moves to the claim that "not everything is good and right to the extent that it is commensurable with respect to any one standard"⁵⁵.

Rawls' pronouncements on incommensurability appear to agree with all these statements. As Frank Michelman has indicated, the premise of a pluralist theory of justice such as that of Rawls is a "deep mistrust of people's capacities to communicate *persuasively* to one another their diverse normative experiences: of rights, values and interests, and more broadly, interpretations of the world"⁵⁶. However, the fact that Rawls arrives at the concept of incommensurability from a different direction, namely, from a critique of utilitarianism in the discourse of economic theory allows him to take advantage of an ambiguity in its use in order to resolve the paradox of priority.

Rawls is involved in combatting utilitarian solutions to the problem of how diverse bundles of goods may be ranked within the framework of a collective rational choice problem.

⁵⁴ "The Fragmentation of Value" in *Mortal Questions* (Cambridge: Cambridge University Press, 1979), pp.129-134. The outcome-centered value types are utility and perfectionist ends, while the agent-centered values types comprise obligations, general rights, and commitment to one's projects.

⁵⁵ Charles Larmore, *Patterns of Moral Complexity* (Cambridge: Cambridge University Press, 1985), p.10

⁵⁶ "Law's Republic" in *The Yale Law Journal* 97 (1988) 1493, at pp.1507 & 1510-1512. Michelman relies on Seyla Benhabib's account of pluralism in her *Critique, Norm and Utopia* (New York: Columbia University Press, 1985), pp. 313-15, 320-21, 332-36.

Utilitarianism, whether in its classical form, or in the form of "shared higher-order preferences"⁵⁷, ultimately reduces the diverse goods proposed by individual rational actors into a "homogenous descriptive magnitude" so that their ranking may take the form of a "monotonic transformation of that magnitude"⁵⁸. Stated more simply, utilitarianism comes down to a commensurability thesis whereby different and competing goods (I_1 and I_2) may be quantified in respect of the variable (F) of utility and thereby ranked according to their respective quantities of this unit. The utilitarian commensurability thesis comes down to a "thin" description of a rational actor's rankings of utility and his or her expected behaviour upon this ranking. The case of the individual rational actor is then generalized for all actors within the rational choice problem⁵⁹. This premise, itself controversial within the models of theoretical economics⁶⁰, becomes even more controversial within

⁵⁷ For the movement of contemporary utilitarian thought to this position, see Allan Gibbard, "Interpersonal comparisons: preference, good, and the intrinsic reward of a life" in Jon Elster & Aanund Hylland, ed., *Foundations of Social Choice Theory* (Cambridge: Cambridge University Press, 1986), pp.165-194. Rawls takes up "shared higher preference" (or "cardinal") utility in "SUPG", pp.174-180, where he refers to the accounts of the position presented by Kenneth Arrow, "Extended Sympathy and the Possibility of Social Choice" *Philosophia* 7 (1987), pp. 223-237, and Serge Kolm, *Justice et Equite* (Paris: Editions du centre national de la recherche scientifique, 1972).

⁵⁸ See Amartya Sen, *On Ethics and Economics* (Oxford: Basil Blackwell, 1987), p.61.

⁵⁹ See eg. Elster & Hylland, *op.cit.* and Jon Elster: *Sour Grapes: Studies in the Subversion of Rationality* (Cambridge: Cambridge University Press, 1983), Ch. 1.

⁶⁰ See the classic essay by Amartya Sen: "Rational fools: a critique of the behavioural foundations of economic theory" in his *Choice, Welfare and Measurement* (Oxford: Blackwell, 1982).

problems of distributive justice in societies containing a multiplicity of individual value orientations.

Rawls characterizes utilitarian theories of distributive justice as teleological in so far as their conception of the right - that which facilitates the solution to the problem of distributive justice - is defined as the maximization of the good of more utility units⁶¹. For Rawls, this involves placing the good before the right by defining the right *in terms of* an independently derived good (utility maximization). This solution is unacceptable because the necessary premise of commensurability must now employ the notion of a "bare person" to stabilize its fixed variable (F). The "bare person" has no determinate conception of the good to which he or she is committed, but rather only a regard for the various desires and capacities of the self as "features to be adjusted for the highest possible place in the *public ranking*"⁶² defined by the utility function. This hedonistic account of the person negates Rawls' premises regarding the recognition of pluralism [the socio-historical circumstances of justice (i)-(iii)]. It has to be rejected by Rawls since

in the circumstances of justice citizens' conceptions of the good are not only said to be opposed but to be *incommensurable*. These conceptions are incommensurable because persons are regarded as moved not only by the two highest-order interests in developing and exercising their moral powers, but also by a determinate conception of the

⁶¹ Will Kymlicka (1988) "Rawls on Teleology and Deontology" in 17 *Philosophy and Public Affairs*, pp. 173-190) claims that Rawls is fighting a "straw man", since the most interesting contemporary theories of utilitarianism are in fact deontological.

⁶² "SUPG", p.180.

good, that is, a conception defined by definite ends and aspirations, and by particular attachments and loyalties and the like⁶³.

To accept the utilitarian notion of the person would therefore involve

the dissolution of the person as leading a life expressive of character and of devotion to specific final ends and adopted (or affirmed) values which define the distinctive points of view associated with different (and *incommensurable*) conceptions of the good⁶⁴.

It is in the defence of this second person - the holder of an incommensurable conception of the good - against the "bare person" of utilitarianism which is held to deprive individuals of their "individuality", and specifically their "moral autonomy"⁶⁵, that Rawls makes the right prior to the good. He achieves this through the use of the Kantian notion of autonomy which grounds the right in a notion of the moral personality as "free" and "equal".

The paradox of the priority of the right over the good is therefore "solved" through a switch in argumentation strategies. Rawls takes up a *deontological* argument in an attempt to remain true to the *socio-historical* premises of his theory of justice [conditions (i)-(iii)]. He employs the Kantian notion of autonomy to define the characteristics of moral

⁶³ "SUPG", p.179 (emphasis added).

⁶⁴ "SUPG", p.181 (emphasis added).

⁶⁵ "SUPG", pp.180-182 offers the clearest account of this critique, developed against Arrow's (op.cit) critique of utilitarianism.

personality regarded as inherent in every citizen of a modern democratic society. In this way, every citizen may be regarded as a "free and equal moral person". But in so doing, Rawls moves beyond the spatio-temporal parameters of such societies to a notion of moral personality, which defends the *difference* of persons. Upon this Kantian terrain Rawls unwittingly erects a new thesis of commensurability in interpersonal comparisons on the basis of a deontologically derived primary goods thesis. He saddles the autonomous Kantian subject with the whole list of primary goods necessary for survival in the democratic constitutional state. For as we have seen in the previous section, it is none other than the needs of this "free and equal moral person" - with his or her sense of justice and capacity to form and revise a rational life-plan - that determines the composition of the list of primary goods.

Rawls' acceptance of incommensurability is thus only possible upon the premise that it is the (Kantian) "free and equal moral person" that may hold an incommensurable conception of the good. But if this is so, this type of incommensurability diverges from what we have identified as the "social premise" of incommensurability. What is now being defended can only refer to an incommensurability which stops short of challenging the recognition of items on the list of primary goods. A subject who has an unchallengeable need for a specified list of primary goods can no longer be autonomous in the Kantian sense. This second form of incommensurability may only be regarded as incommensurability "admissible" to the just society. By switching between the social premise of incommensurability and the notion of "admissible"

incommensurability, Rawls resolves the priority of the right by allowing the role of the former conception to be determined by the deontological argument grounding the latter.

Rawls' restriction of incommensurability is a further instantiation of the classical charge that the list of primary goods is itself *a determinate (albeit minimal) conception of the good*. Rawls, particularly in his later articles, has not denied that the right contains *some* conception of the good. As we have noted, he defines this minimal conception of primary goods as the "political good of a well-ordered society"⁶⁶, and he distinguishes it from inadmissible conceptions of the good derived from general and comprehensive doctrines. But since the distinction between admissible and inadmissible is itself raised from the standpoint of the right, it begs the question of its own legitimacy.

Rawls' perserverance with this distinction reduces the credibility of his claim to uphold the fact of pluralism [represented in conditions (i)-(iii)]. The crushing force of such a deontologically determined distinction upon the social premises of the theory may be observed more clearly if we return to the distinction between a case of intolerance and a case of civil disobedience. According to Rawls, it should make no difference to the theory of justice whether those that come before an institution of justice hold incommensurable conceptions of the good or not. The "overlapping consensus" on

⁶⁶ "PRIG", pp.270-73.

the principles of political justice secures the list of primary goods as a legitimate basis for interpersonal comparisons.

If however we adopt Rawls' *social* premise of incommensurability rather than the meagre measure of incommensurability conceded to the Kantian moral person as-Rawlsian-citizen, the legitimacy of the deontologically derived appropriate/inappropriate distinction and this second notion of "admissible incommensurability" becomes questionable. We may now reconstruct Rawls' mode of conflict resolution in the following way:

Claims raised Concep- tions of the Good		
	Inappropriate	Appropriate
Commensurable	A. Normal Case 1	B. Normal Case2 Civil Disobedience
Incommensurable	C. Intolerance	D. X X X

[Table 1]

Assuming that the state continues to raise an appropriate claim of justice, two possibilities of a "normal case" arise (Positions A and B). In these cases, the parties' conceptions of the good involve conflicting claims which may be sorted out by their common acceptance of the primary goods list as embodying non-negotiable aspects of the "right". The distinction

between appropriate/inappropriate retains its legitimacy on the basis of this consensus. Appropriate claims trump inappropriate claims⁶⁷. Now, a case involving a party that comes to a conflict on the basis that its conception of the good is incommensurable with certain items on the list of primary goods, does not lend itself to this analysis. It is *structurally impossible* for such actors to raise an "appropriate" claim to justice. Upon the social premise of incommensurability, which both we and Rawls hold to characterize a growing number of modern social conflict situations, Rawls' model renders these actors' claims inadmissible (Position D). Cases of so termed "intolerance" are therefore recognized as stemming from incommensurable concepts of the good but remain inadmissible (Position C). But cases of civil disobedience are only *prima facie* regarded as raising inadmissible claims stemming from incommensurable concepts of the good (Position C). They are carried over into Position B - "normalized" only by the switch between the social premise of incommensurability and the notion of "admissible" incommensurability.

⁶⁷ It is important, but incidental to this argument, that Rawls offers no account of how two appropriate claims to justice referring to different items on the relatively heterogenous list of primary goods may be weighed against each other. His discussion of indexing primary goods in the "difference principle" (whereby the social order is prohibited from securing the advantages of the "better off" unless doing so is to the advantage of the "less fortunate") only concretizes the possibility of indexing in the case of the redistribution of income in the just society. This is a discussion premised on the capacity to quantify distributive shares in the economy (cf. *TJ*, pp. 152-161, pp. 174-5). The premise of quantification -- the premise of utilitarian approaches to distributive justice -- is more difficult to sustain in a conflict between eg. primary goods list items (e) "the social basis of self-respect" and item (d) "income and wealth". To our knowledge, no attempt has been made to provide an internal "application discourse" for the list of primary goods in the Anglo-American debate.

Thus the legitimacy of the distinction between civil disobedience and intolerance comes down to a resolution of the priority paradox which betrays pluralism in terms of a consistent commitment to a liberal position, something which amounts to promoting a determinate conception of the good. Consistency requires that one either changes theory to conform to practice, or changes practice to conform to theory. "If we manipulate theory in order to conform to practices that seem sound to us, theory becomes nothing more than a pliable tool of rationalization"⁶⁸. Manipulation in a theory of justice, is even more pernicious. For if put into operation, the theory changes practice.

3.1 *Habermas and Primary Goods*

The dangers of privileging a list of primary goods within a theory of justice have long been recognized by Habermas. In *Communication and the Evolution of Society* he claims that to secure primary goods such as money, free time and security as neutral means ("media") for the attainment of a "multiplicity of concrete ends selected according to values" - the project of Rawlsian liberalism - is only to secure the circumscribed opportunity structures of "possessive individualism". Media such as these only provide the necessary conditions for the life of private, isolated commodity owners who are linked together

⁶⁸ Fletcher, *op.cit.*, pp.1269-70.

by means of an exchange economy⁶⁹. The Kantian derived assumption of the private autonomous subject which fuels such projects leaves them firmly within the bonds of bourgeois ideology⁷⁰. Habermas himself requires the step beyond the Kantian subject to inter-subjectivity in the social realm of the life-world, a step he takes through the use of George Herbert Mead's notion of the "ideal taking over of roles" between subjects.

Habermas' critique parallels long standing Anglo-American critiques concerning the assumption of a "liberal individualist self" within the notion of primary goods⁷¹. But he goes much further in the following way:

"I doubt ... whether the form of life mirrored in system-conforming rewards [of the exchange economy] can today -- in the light of the *alternatives* opened by capitalist development itself - still be as convincingly legitimated as it could in Hobbes' time."⁷²

Habermas claims that capitalist society generates new forms of life which cannot simply be contained or legitimated within the

⁶⁹ "Legitimation Problems in the Modern State" in *Communication and the Evolution of Society* (London: Heinmann, 1979), p.198. Habermas cites C.B. McPherson's formulation of the ideology of "possessive individualism".

⁷⁰ Habermas, "Gerechtigkeit und Solidarität" in W. Edelstein and G. Nunner-Winkler (eds.) *Zur Bestimmung der Moral* (Frankfurt am Main: Suhrkamp, 1986), p. 307. On the validity of this critique with respect to Kant, see the debate stemming from Max Adler, *Kant und der Marxismus* (1925), Reprint (Aalen: Scientia, 1975).

⁷¹ One of the earliest and well-known criticisms came from Thomas Nagel: "Rawls on Justice" reprinted in *Reading Rawls: Critical Studies on Rawls' "A Theory of Justice"* (Oxford: Basil Blackwell, 1975). This line became the mainstay of the so-termed "communitarian" criticisms of Michael Walzer, Michael Sandel and Charles Taylor (see fn.44 above).

⁷² "Historical Materialism and the Development of Normative Structures" in *Communication and the Evolution of Society*, p.198, (emphasis added).

parameters offered by an exchange economy. These "alternative" forms of life are related to the possibility of a value universalism which might lead to a form of the "pursuit of happiness" which would not merely consist in the accumulation of "material objects of which one disposes privately, but [in the] bringing about [of] social relations in which mutuality predominates and satisfaction does not mean the triumph of one over the repressed needs of the other"⁷³. Given this process, the use of primary goods as a basis for the regulation of interpersonal conflicts within such societies is rejected for two reasons.

Firstly, as we have noted in our discussion of Rawls, many of the demands arising from these new forms of life cannot easily be managed through the classical mechanisms of distributive justice theory (eg. Rawls' "difference principle"). Drawing upon the "new politics" and "post-material values" scholarship of Inglehart, Hildebrand and Dalton, Barnes and Kaase, Habermas has recognized that many of the conflicts that have developed in advanced Western societies deviate from the welfare state pattern of institutionalized conflict over distribution. These conflicts do not occur in the domains of material reproduction, but rather arise in domains of cultural reproduction, social integration and socialization:

they are carried out in subinstitutional - or at least extraparliamentary - forms of protest, and the underlying

⁷³ *Ibid*, p.199. Habermas makes reference to utilitarian theories which allow for sacrificing one person's good because it maximizes happiness overall. For a criticism which takes this as a *misdescription* of utilitarianism, see Will Kymlicka (1988) "Rawls on Teleology and Deontology", *op.cit.*

deficits reflect a reification of communicatively structured domains of action that will not respond to the media of money and power. The issue is not primarily one of compensations that the welfare state can provide, but of defending and restoring endangered ways of life. In short, the new conflicts are not ignited by distribution problems but by questions having to do with the grammar of forms of life⁷⁴.

Social movements in advanced western societies, are not primarily concerned with a re-distribution of wealth but with a redefinition of national and international issues which have to do with *justice*, eg. the location of nuclear power plants, missile installations, education and abortion debates, censorship, urban development. Their very nature does not allow them to be dealt with through a distributive mechanism premised on the mechanisms of the exchange economy.

Secondly, Habermas' adoption of a stronger rationality thesis than that used by Rawls' members of the "overlapping consensus" (or "choosers" in the "original position"), eliminates the need for a base of interpersonal comparisons as imperfect as the primary goods thesis. Unlike most thinkers in the Anglo-American liberal tradition, Habermas does not take the autonomous individual as a starting point for his analysis, but rather the discursive intersubjective relations which obtain between human beings in the "life-world"⁷⁵. The life-world is characterised by a rationality of its own which is communicative and consensus-oriented. The rules of this

⁷⁴ *The Theory of Communicative Action* vol.II (Cambridge: Polity, 1987), p.392, (hereinafter cited as *TCA* vol. II). Cf. also "Litmus Test", p.110.

⁷⁵ Cf. Habermas, "Gerechtigkeit und Solidarität" in W. Edelstein and G. Nunner-Winkler (eds.) *Zur Bestimmung der Moral* (Suhrkamp: Frankfurt am Main, 1986), p.307.

discourse require that consensus must be achieved by means of the better argument alone, which is to say that all forms of domination and violence are excluded. Claims raised in communicative action are validated through the internal validity claims of illocutionary speech acts⁷⁶. Opposed to the life-world is the "system" which Habermas divides into the subsystems of economy and politics. The latter work according to their own internal logic, and are steered by the media of money and power respectively. Whereas the rationality of the life-world is characterized by communicative action, the rationality of the system is goal-oriented and characterised by instrumental-strategical action. In Kantian shorthand: in the world of the system people treat themselves as means to an end, whereas in the life-world they also treat themselves as ends in themselves.

These two spheres of society stand opposed to each other. At their intersection stands law which belongs to both and expresses the ongoing battle between them. This double character of law is captured by Habermas in his distinction between law as a *medium* and law as an *institution*⁷⁷. Law as a medium belongs to the system, and expresses the needs of systemic imperatives - the functioning of the economy and political administration. Law as an institution belongs to the life-world, in so far as the normative bases of constitutional

⁷⁶ For Habermas' classification of speech acts and the discussion of the validity claims raised by illocutionary speech acts see *The Theory of Communicative Action* vol.I, (Boston: Beacon Press, 1984), pp.286-337, (hereinafter cited as *TCA*, vol.I).

⁷⁷ *TCA* vol. II, pp.365-373.

law, and of the principles of criminal law and penal procedure cannot be sufficiently legitimized through a positivistic reference to their conformity to legal procedure (i.e. through self-reference). Rather, the legitimation of these norms require "*substantive justification*" since they "belong to the legitimate orders of the lifeworld itself and, together with informal norms of conduct, form the background of communicative action"⁷⁸. Substantive justification thus necessitates an "internal connection" between law and morality, in which morality derives its normative force from the satisfaction of the validity claims raised in communicative action within the life-world. In this fashion, law as an institution (life-world), legitimates the use of law as a medium (system) in politics, where law is called upon to legitimate the executive enforcement of adjudication⁷⁹.

It is now clear that when Habermas comes to explain how law may be called upon to regulate interpersonal conflict⁸⁰, he need not defend the impartiality and legitimacy of the "right" by requiring all successful claims to the "right" to refer to a list of primary goods (Rawlsian admissibility/inadmissibility). He only requires such claims to meet the validity conditions that would be required of norms proposed under the "ideal taking over of roles" in communicative action. Habermas

⁷⁸ TCA, vol.II, p.365.

⁷⁹ Habermas, "Law and Morality", p. 274.: "it must be shown how the moral point of view of impartial judgment can be stabilized from within positive law itself" See also "Towards a Communication-Concept...".

⁸⁰ Law's other task being the "pursuit of collective goals and programs", the conceptual distinction being established most clearly in Habermas, "Towards a Communication Concept..."(*op.cit*, pp.144-6).

therefore requires that through a discourse of justification each valid norm satisfy the "(U)" principle:

daß die Folgen und Nebenwirkungen, die sich jeweils aus ihrer *allgemeinen* Befolgung für die Befriedigung der Interessen eines *jeden* Einzelnen (voraussichtlich) ergeben, von *allen* Betroffenen akzeptiert (und den Auswirkungen der bekannten alternativen Regelungsmöglichkeiten vorgezogen) werden können⁸¹.

The "internal connection" between law and morality offered by the (U) principle is motivated by Habermas' desire to defend the lifeworld against the threat of its "colonization" by the imperatives of the (economic and political) system which find expression through law as a medium. This is the theory's normative standpoint. The form of rationality it requires is not only referable to a theory of psychological development - which Habermas has attempted to provide⁸² - but also to a particular phase of *historical* development, that of *modernity* whose ideal of freedom, equality and fraternity spearhead the project of human emancipation⁸³. Bourgeois society develops new forms of life which are based on a *universalization* of the values of modernity. In so far as they contain a promise to realize modernity's emancipatory potential, Habermas acknowledges the importance of *specific* social movements and, furthermore,

⁸¹ Jürgen Habermas, "Diskursethik - Notizen zu einem Begründungsprogram" in *Moralbewußtsein und kommunikatives Handeln*, pp.53-126, at pp.75-76. Hereinafter we shall refer to this principle through its accepted abbreviation "(U)".

⁸² "Moral Development and Ego Identity" in *Communication and the Evolution of Society* (op.cit.) and the title essay of *Moralbewußtsein und kommunikatives Handeln* (op.cit.) pp.127-205.

⁸³ See eg. Jürgen Habermas, "Volkssouveränität als Verfahren: Ein normativer Begriff von Öffentlichkeit" in *Merkur* 43 (1989), pp.465-477 and "Kant, Foucault and the Enlightenment" in *Critique* 42 (1986), pp.794ff.

of the *specific* values they propose. By returning to the distinction between cases of civil disobedience and cases of socio-political pathology, we shall examine how he attempts the delicate balance between the impartiality of a legal procedure designed to secure the plurality of modernity's life forms and the privileging of modernity's emancipatory character through law.

3.2 *Civil Disobedience: Applying the distinction*

On the occasion of the Pershing missile protests in the Federal Republic of Germany in the early 1980's, Habermas claimed that civil disobedience is "among the indispensable necessities of a mature political culture"⁸⁴. As a category, civil disobedience "must remain suspended between legitimacy and legality" since the citizen's obedience to the political authority of the democratic constitutional state ought not, in Habermas' view, be reducible to the positive law's sanctioning of such authority, but only to the legitimacy of the same. Habermas explicitly adopts Rawls' necessary conditions for a successful claim to civil disobedience: The acts must be a "public", "symbolic" and "non-violent" and must amount to a "*premeditated transgression* of individual legal norms" with the sole "intention of appealing to the capacity for insight and the sense of justice of the relevant majority"⁸⁵. Furthermore, Habermas seems to indicate that the disputed policy must be

⁸⁴ Habermas, "Litmus Test", p.106.

⁸⁵ *Ibid*, pp.100-102. See also Stephen K. White, *The Recent work of Jürgen Habermas*. (Cambridge, Cambridge University Press, 1988), p.141.

one which will have relatively irreversible consequences or which involves a "confrontation of different forms of life"⁸⁶. The defence of the civil disobedience category extends so far as to create an exception to the liberal democratic principle of majority rule, since this principle may lead (and already has lead) to a tyranny of an errant majority over an enlightened minority. Habermas pleads for a reflexive practicing of this rule⁸⁷, which is to say that in a case of civil disobedience, the majority ought to limit itself in exercising its majoritarian rights against civil dissidents.

Given Habermas' recent movement towards the parallel but distinct use of discourses of justification (*Begründungsdiskurse*) and discourses of application (*Anwendungsdiskurse*) in law⁸⁸, his treatment of civil disobedience might be reconstructed in the following way: As with Rawls, a successful plea of civil disobedience involves the claim to apply, in a given situation, a newly-proposed norm of justice which collides with an existing norm considered applicable to the situation. To this extent the newly-proposed norm is *prima facie* invalid. Both norms would be removed to a discourse of justification facilitated through the discursive rules of communicative action. Here, rights to cultural membership cannot be validated unless they are

⁸⁶ "Litmus Test", pp.110-111 in the context of the missiles protest.

⁸⁷ Drawing on the work of Claus Offe, "Legitimation Through Majority Rule?" in C. Offe *Disorganized Capitalism: Contemporary Transformations of Work and Politics* (Oxford: Basil Blackwell, 1985), pp. 259-299.

⁸⁸ In the context of the theory of communicative action, the distinction between the two levels of discourse has been introduced by Günther, *Der Sinn für Angemessenheit: Anwendungsdiskurse in Moral und Recht* (Frankfurt am Main: Suhrkamp, 1988) and adopted by Habermas in "Law and Morality...", pp. 276-277 and "Towards a Communication Concept...".

compatible with the (U) principle⁸⁹. In cases of civil disobedience, both norms would be valid if they satisfy the (U) principle. The collision of norms would therefore be "external" since it would not involve their respective validity⁹⁰. The collision would now become a matter for the discourse of application, which no longer deals with the validity of the norms, but only with the appropriateness of their respective application in the given situation under conditions of local and temporal constraint. The valid norm thus raised through civil disobedience would be accommodated through a "realignment" or "re-ordering" of the (already validated) norms of the legal system.

A case of social pathology may be distinguished from a case of civil disobedience in that it involves an "internal collision" of norms on the level of the discourse of justification. Whereas an existing legal norm would satisfy the (U) principle, the norm advanced by a "pathological" life form would not. The collision would result in the existing norm's victory and its subsequent application in the given situation.

This analysis permits us to describe a potential collision between a norm raised by a group of religious fundamentalists

⁸⁹ In the context of a conflict between the democratic majority rule principle and minoritarian claims, Habermas holds that "There should be no minorities by birth, for instance on the basis of separate cultural traditions and identities", in "Litmus Test", p.111.

⁹⁰ This classification is used by Klaus Günther in "Ein Normativer Begriff der Kohärenz für eine Theorie der Juristischen Argumentation" in *Rechtstheorie* 20 (1989), pp.163-190, at pp. 168-170 upon a modification of a distinction introduced by Robert Alexy, *Theorie der Grundrechte* (Baden-Baden: Nomos, 1985), pp.71ff.

and the norm of majority rule as coming down to the fact that: (1) The norms of religious fundamentalism are not universalizable as (U) requires; because (2) religious fundamentalism has a *lower form of rationality* that is inherently hostile to the conditions of communicative action, and is displayed through "withdrawal" from, or even resistance to, the public sphere⁹¹. By way of contrast, if one of the so-called "new social movements" was to commit acts of civil disobedience, it would most likely (1) be capable of proposing universalizable norms and; (2) display a degree of rationality that promises to realize the emancipatory potential of communicative action. Habermas' recognition of this potential in the "new social movements" would therefore allow us to distinguish the problematic case of "new" religious fundamentalism (eg. "revivalism" in the U.S.A.) even though both movements are a reaction to the conditions of modernity. As Stephen White notes:

from Habermas's perspective, social movements are reacting against the increasing colonization of the lifeworld and cultural impoverishment. This perspective allows one to understand the peculiar defensive quality such movements exhibit. On the one hand, there is a defensive reaction against the encroachment of the state and economy on society, something which is similar to traditionalistic, reactive movements. On the other hand, the behavior of new social movements cannot be understood simply as a reaction against the 'destruction of traditional forms of life', but rather as a reaction against the deformation of 'posttraditional forms of life' made possible by a rationalized lifeworld. Protecting the conditions of possible 'communicative sociation' means generating space for more

⁹¹ See *TCA*, vol. II, pp.392-396. Cf. White, *op.cit.*, p. 124ff.; cf. also Offe, *op. cit.*, (fn 1).

autonomous construction of group identity and political deliberation⁹².

This may hold for the distinction between a "new social movement" and U.S. revivalism. But what of the increasingly problematic case of islamic fundamentalism? Whereas the first type of fundamentalism partakes in the system's manipulative use of mass-media such as television, the second largely does not. But neither are carriers of emancipatory potential since they rely on traditional forms of life.

The very ability to draw this distinction between forms of rationality (and hence between cases of civil disobedience and pathology, new social movements and religious fundamentalism) ultimately depends on the solution to the following paradox: The impartial regulation of interpersonal conflicts from the standpoint of justice ("the right") *requires* the privileging of certain forms of rationality, namely those that are capable of arriving at the standpoint of impartiality themselves through their emancipatory potential for ideal role taking (the "admissible"). Conversely, those life forms (and the "good" they try to achieve) which are incompatible with the modes of rationality capable of achieving the "moral point of view" (strategies of withdrawal or resistance) must be excluded (the "inadmissible"). Thus we have a paradox similar to that of Rawls' "priority of the right". Habermas must now show, ... dare we suggest ... "substantial justification" of his distinction between forms of rationality to overcome it.

⁹² White, *op. cit.*, p. 124.

3.3 The Rationality of Pre-modern Societies

In the *Theory of Communicative Action*, Habermas reviews the debate between universalists and contextualists which was sparked off by Peter Winch⁹³. Although attempting a *via media*, he is nevertheless closer to the universalists' claim of universal standards of rationality than to the relativists' claim that there are unique forms of rationality which are cultural context-dependent. It is in this context that he *rejects* Winch's premise of the *incommensurability* in value of various life forms⁹⁴, thus distinguishing himself from the social premise of incommensurability we have discussed in relation to Rawls. Habermas distinguishes between different forms of a so-termed "universal rationality", highlighting instrumental and communicative rationality. The result of his discussion is that the potential of a full rationality cannot reside in pre-modern, mystical world-views, but only in western world-views to the extent that these societies do not exclusively rest on a restricted or distorted version of this rationality. It is only in post-traditional cultures that the emancipatory forces of communicative action of the life-world may be realized against the instrumental reason of the system.

Habermas gives two arguments for this conclusion. The first derives from an empirical observation, the second from a theoretical scheme. We address both in turn. The first

⁹³ The following discussion is based on *TCA* Vol.I, ch.1.

⁹⁴ *TCA* Vol.I, pp.59-66.

argument holds that due to the undeveloped state of their productive forces, archaic societies cannot bring risks under control. The flood of contingencies stemming from an unmastered environment are merely "interpreted away" (*weginterpretiert*)⁹⁵. This is an indicator for the fact that these societies do not address their problems "properly". However, as the experience of ecological problems in modern societies indicates, exactly the same behavior is found in modern societies when they are confronted with unexpected (and dangerous) events⁹⁶. Habermas might well argue that modern societies possess the potential for self-correction, whereas archaic societies do not. But from the discussion of this problem it is rather unlikely to expect a clear answer in Habermas' favour since a large part of the ecological discourse, including the critical scientific community, denies the existence of precisely this capacity.

The second argument is to the effect that the differentiation of value spheres - most developed in modern societies - is a sort of teleological process which gives us the yardstick to measure modern and premodern societies and their potentials for rationality. For Habermas, social evolution is a process which leads to *higher* stages of rationality⁹⁷. The totalizing

⁹⁵ TCA, vol. I, pp.46/47.

⁹⁶ See Ulrich Beck, *Gegengifte. Die organisierte Unverantwortlichkeit* (Frankfurt am Main, 1988) and Charles Perrow, *Normal Accidents* (New York, 1984).

⁹⁷ Habermas goes to the extent of comparing "phylogenetic" findings on archaic societies with research findings in the "ontogenetical" sphere, suggesting that the "socio-centrism" of primitive societies is to be viewed as parallel to the problem of the egocentrism of young children in western societies (TCA, vol.I, p.73, fn.49).

mode of thought in pre-modern societies is unable to draw the "familiar (to us) semiotic distinctions between the sign substratum of a linguistic expression, its semantic content, and the referent to which a speaker can refer with its help"⁹⁸. Based on this interpretation of pre-modern rationality, the capacity for rational action orientation in the life-world requires that a cultural tradition must, *inter alia*:

(a) differentiate its validity claims and make available concepts for the objective, social and subjective worlds,

(b) permit a reflective relation to itself, which involves stripping itself of dogmatism to permit, in principle, that interpretations stored in tradition be placed in question and subjected to critical revision,

(c) socially institutionalize its learning processes so as to permit a feedback of these processes⁹⁹.

But if Habermas is to eventually rely on this interpretation of rationality to deal with contemporary "traditionalists" such as U.S. revivalist groups, there is insufficient empirical evidence to suggest that the life-world of such groups is fully comparable to that of archaic societies. Furthermore, these rationality conditions need not be accepted from a normative point of view: distinguishing life forms on the basis of their capacity to achieve the rationality required of the "moral point of view" is no way to defend the impartiality of the "moral point of view" towards all life forms, given that the "moral point of view" is itself defined by the conditions of this rationality.

⁹⁸ TCA, vol.I, p.49.

⁹⁹ TCA, vol.I, p.71.

We therefore have a less than satisfactory resolution of the paradox involving the theory's demands for impartiality on the one hand, and its privileging of certain values on the other. The distinction between civil disobedience and political pathology is resolved through the claim that only post-traditional life-forms harbour the social rationality which promises the universalization of emancipatory values. According to Habermas, a life form is rational when it allows individuals to build up principled moral insights and enhances their realization¹⁰⁰. In the next section we argue that one of these values is "solidarity". By introducing solidarity as a substantive element into a theory which gives priority to the right, Habermas attempts to resolve the paradox. By invoking the theory's own pronouncements on impartiality, we argue that this move merely defers the paradox.

3.4 *Solidarity: Moral or Ethical?*

Habermas addresses this problem explicitly in his article "Gerechtigkeit und Solidarität"¹⁰¹ where he acknowledges that deontological ethics have largely excluded questions of happiness and suffering¹⁰² a position which Kohlberg, among

¹⁰⁰ "Über Moralität und Sittlichkeit - Was macht eine Lebensform rational?" in H. Schnädelbach (ed.) *Rationalität* (Frankfurt am Main: Suhrkamp, 1984), p. 228 (hereinafter cited as "Moralität...").

¹⁰¹ In W. Edelstein and G. Nunner-Winkler (eds.) *Zur Bestimmung der Moral* (Frankfurt am Main: Suhrkamp, 1986), hereinafter cited as "Gerechtigkeit..."

¹⁰² *id.*, p. 303.

others, has attempted to rectify¹⁰³. Habermas agrees with Kohlberg's intentions (which he finds "pioneering"), but not with the execution of the program. At first sight he seems to accept that there is a place for the good within the theory of the right¹⁰⁴. Habermas differs from Kohlberg in that he does not see benevolence, but *solidarity* as the natural complement of justice¹⁰⁵. But Habermas is subsequently reluctant to admit that he is introducing elements of the good into the theory of the right through claiming that his form of post-metaphysical thought does not reconcile Kant with Aristotle¹⁰⁶. Habermas only admits that he attempts to exploit the modern concept of justice in order to overcome its individualistic bias by stressing solidarity as the obverse of justice, thus introducing to the right only those "structural aspects" of the good life which are common to *all* forms of communicative socialization¹⁰⁷. Is this the resolution of the paradox?

In our view there is a whole array of possible goods which stand between a "full" notion of the good life (containing the

¹⁰³ See L. Kohlberg, D. Boyd & Ch. Levine, "Die Wiederkehr der sechsten Stufe: Gerechtigkeit, Wohlwollen und der Standpunkt der Moral" in *Zur Bestimmung der Moral* (*op.cit.*), p.205ff.

¹⁰⁴ Cf. "Gerechtigkeit...", *op.cit.*, p. 303.

¹⁰⁵ This concept does not seem to be worked out adequately. As Arne J. Vetlesen rightly remarks, solidarity at its base must also have an emotional feeling of empathy. However, this would presuppose that we are able to identify ourselves with human fellows who are oppressed in a particular way, i.e. in a way we can have compassion with. It seems obvious that the cases of possible solidarity here are much more restricted. (Vetlesen, "Empathy and Solidarity in Discourse Ethics", MS., Fach Philosophie, G.W. Goethe Universität: Frankfurt, 1989).

¹⁰⁶ "Gerechtigkeit...", p.314.

¹⁰⁷ *id.*

ancient elements of cosmic justice) and a "thin" one (which only contains solidarity in Habermas' sense). If post-metaphysical thinking is to be the basis for an impartial theory of justice - issues such as Kant versus Aristotle put aside - Habermas' project seems to run against the central motivation of modern projects for justice, namely, the fact that they are designed to avoid the entrance of *any* form of the good into the right, and not simply cosmic views of the good.

In Habermas' view the principle of universalization (U) serves as the cutting edge in distinguishing between admissible and inadmissible claims to justice. In applying this principle, can we avoid the danger of adjusting the theory to desirable social practices? Practices of everyday life do not embody intersubjective validity *per se*. They are only candidates for such embodiment. Universalistic morals, therefore, do not deal with the preference ranking of values but with the ought-character of norms¹⁰⁸. Habermas thus distinguishes between morality (*Moralität*) and ethical life (*Sittlichkeit*). The first is universal, expressing the moral point of view and evaluating questions of the good life hypothetically. The second is the real ethical life of a community (life-world) which mainly concerns questions of justice and their normative validity. Habermas employs the metaphor of universal morals the kernel and the forms of ethical life the peel¹⁰⁹. He thinks that we cannot submit concrete existing ethical forms of life to a moral view because individuals who have been brought up in such

¹⁰⁸ "Moralität...", p. 221.

¹⁰⁹ "Moralität...", p. 226.

contexts cannot chose the form of life in which they have been socialised as they can chose a norm after due reflection¹¹⁰. They can only distance themselves in a hypothetical way from the values of their community -- a virtue which the moral point of view requieres.

On the basis of the kernel and peel metaphor, we might construct the following relations: Morality stands to ethical life just as justice to the good life, and these like the normative to the evaluative. It is not very clear if in all three cases the former serves as a measure for the latter. Habermas is explicit only with respect to morality and ethical life where the former serves as a yardstick to judge on the latter. In a discussion with Rüdiger Bubner Habermas defends his viewpoint that one needs a reference point *outside* concrete existing ethical life-forms in order to critically examine them. This is indispensable if one wishes, like Bubner, to trace rationality in real existing ethical communities¹¹¹. But Habermas does not extend this reasoning to the relation between the good life and justice. Here he simply states that they are "complementary" or even two aspects of the same¹¹². This is so because the

¹¹⁰ Cf. "Moralität...", p. 222. But evaluative questions ("Fragen des guten Lebens") are not "theoriefähig", because they are not, as normative questions are, accessible to rational and binding discussions, cf. "Gerechtigkeit und Solidarität...", p. 304. See, also, *TCA*, vol II., p. 109.

¹¹¹ Cf. Bubner, "Rationalität, Lebensform und Geschichte", in H. Schnädelbach (ed.) *Rationalität*. Frankfurt, 1984, pp. 198-217; see also Habermas, "Moralität...", p. 233 ff.

¹¹² "Die deontologisch begriffene Gerechtigkeit fordert als ihr Anderes Solidarität. Dabei handelt es sich nicht so sehr um zwei Momente, die sich ergänzen, als vielmehr um zwei Aspekte derselben Sache." ("Gerechtigkeit...", p. 311).

communicative structure of social life provides both the possibility for *just* arrangements as for solidaristic behaviour. The fragile identity of individuals can only be stabilized reciprocally and in the maintainance of the group's identity. From this, Habermas concludes the existence of a close relationship between care for the well-being of the neighbour and the interest in the common welfare, a principle with a universalistic dimension¹¹³. Habermas therefore seems to assign a big task to the concept of solidarity since for him, this means not only to care for the well-being of the fellows of one community and one life-form, but also to care for the global collectivity. For Habermas, arguments (as such) reach *beyond* particular life-worlds -- to everything which has a human face¹¹⁴.

It seems that Habermas has succeeded in avoiding the paradox of impartiality by fusing the good with the right by attributing to solidarity a deep locus in human nature¹¹⁵. He can now claim that solidarity is nothing outside justice but only justice under another name. It seems to us, however, that this solution burdens the nature of communicative communities with too many tasks. As several authors have pointed out,

¹¹³ *Ibid*, p. 310.

¹¹⁴ *Ibid.*, p. 312. For Habermas there is a "Gewißheit der Verschwisterung" and an "Element der Versöhnung", *ibid*, p. 313.

¹¹⁵ Cf. the following statement: "[W]eil Diskurse dem verständigungsorientierten Handeln als Reflexionsform gleichsam aufsitzen, können sie demselben Medium sprachlich vermittelter Interaktionen, dem die Individuen ihre Versehrbarkeit verdanken, auch die zentralen Gesichtspunkte für die moralische Kompensation dieser tiefsitzenden Schwäche entnehmen." ("Gerechtigkeit und Solidarität...", *op.cit.*, p. 312).

Habermas assimilates the nature of a community of communication to the nature of a research community¹¹⁶. Against such a criticism, Habermas would probably affirm that morality is not a local and historical particularism, but universal. It is telling that Habermas, in defending this approach, makes a reference to Kant (like Rawls) and Rousseau, who both developed the notion of *autonomy* of persons¹¹⁷. With this notion we are able to distinguish post-conventional conceptions of justice and morals from those of traditional societies. But in so doing, Habermas seems to over-generalize the historically specific forms of (modern) ethical life, namely, those theorized by Kant and Rousseau.

3.5 A Critical Political Public of Limited Virtue

Let us look at the paradox from a slightly different angle. From Habermas' early writings onwards, the notion of a critical public has always been important. In *The Philosophical Discourse of Modernity* (1985)¹¹⁸ he affirms that the "political

¹¹⁶ Karl-Heinz Ilting, for example, pointed out, that "die Bedingungen einer methodisch geführten Diskussion und die Bedingungen eines nach universalen ethischen und rechtlichen Normen geordneten Zusammenlebens endlicher Vernunftwesen keineswegs zusammenfallen", see Ilting, "Geltung als Konsens", *Neue Hefte für Philosophie*, 1976, p. 29. See also Ilting's criticism of K.-O. Apel, whose "Versuch, die Geltung universaler moralischer Normen durch Reflexion auf die Voraussetzungen einer rationalen Argumentation zu begründen, besonders problematisch [ist].", Ilting, "Der Geltungsgrund moralischer Normen" in W. Kuhlmann & D. Böhler (eds.) *Kommunikation und Reflexion. Zur Diskussion der Transzendentalpragmatik. Antworten auf Karl-Otto Apel* (Suhrkamp: Frankfurt, 1982), p. 615.

¹¹⁷ "Moralität und Sittlichkeit...", p. 226.

¹¹⁸ English translation: Cambridge: MIT Press, 1987. Cf also White, *op.cit.*, p. 126.

public sphere, in which complex societies gain a normative distance from themselves and are capable to assimilate collectively experiences of crises" is different from the political system. We do not wish to address the problem of how a complex society may be conceived as capable of reflecting on itself as a whole¹¹⁹. We only stress that Habermas *himself* sees a paradoxical task in the practice of the legal consitutional state: it must protect and sustain the distrust of injustice that appears in legal forms, while ensuring that this distrust cannot assume an institutionally secure form. Habermas says: "With this idea of non-institutionalized distrust towards itself, the idea of the consitutional state stretches beyond the ensemble of its particular, positively established regulations." How is this resolved ? The answer is: "The paradox finds its resolution in a political culture that provides its citizens with the sensibility - with the measure of judgement and willingness to take risks - which is necessary in transitional and exceptional situations to recognize the legal offenses against legitimacy and, if need be, to act illegally out of moral insight."¹²⁰

A critical public, a "political culture", is thus the guardian of legitimacy. People participating in actions of civil disobedience are the corrective which may be necessary in exceptional cases of injustice. But how can one be sure where injustice lies? How is one to judge if the agents of illegal acts violate

¹¹⁹ Cf. Habermas, "Können komplexe Gesellschaften eine vernünftige Identität ausbilden?" in *Zur Rekonstruktion des historischen Materialismus* (Frankfurt: Suhrkamp, 1982), esp. pp. 110 ff.

¹²⁰ Habermas, "Litmus Test", p. 103.

regulations which are legitimate or illegitimate? According to Habermas, we do not judge this matter upon some arbitrary standard of private morality, of special rights, or of a privileged access to truth¹²¹. "Only those moral principles are authoritative which are reasonable for all and upon which the modern constitutional state grounds the expectation of voluntary recognition by its citizens"¹²². The basic impartiality paradox is only relocated in the question of the critical public.

In a recent article on popular sovereignty¹²³, Habermas takes up the question again, by setting out a model for modern society which takes democratic ambitions seriously. Rather than advocating an *institutionalization* of the "critical public" (*Öffentlichkeit*), Habermas wants to keep it "fluid" and ever present. An institutionalized critical public would soon be absorbed by the political system. To avoid this, "communicative power is exercised in a way which is similar to that of a *siege*". This metaphor is meant to express that the political institutions of democracy must submit to a permanent process of criticism stemming from outside the political system¹²⁴. However, we are warned against an "overburdening" of the citizens with moral expectations - an attitude of which the republican tradition (and most recently the "civic culture"

¹²¹ *Ibid*

¹²² *Ibid*, p.103-4.

¹²³ "Volkssouveränität als Verfahren. Ein normativer Begriff von Öffentlichkeit" in 43, *Merkur* (1989) p.465-477.

¹²⁴ Habermas, "Volkssouveränität...", p. 475

thesis) is guilty¹²⁵. This presumption of virtue (*Tugendzumutung*) cannot be the base on which to ground solid institutions of democracy. Habermas says, that we have to explain how it is possible in principle that the morals of citizens and their self-interest can go together¹²⁶.

When Habermas insists on linking law to a moral *argumentative* discourse, he admits that this discourse is only able to *promote* correct results. It does not *guarantee* them. This is because the participants in such discourses act under local, social and temporal constraints and are thus liable to new arguments¹²⁷. Although Habermas has attempted to accomodate these constraints through the introduction of discourses of application into his theory, this cannot avoid the following self-referential circle: it is only the participants of the discourse who can judge if the just procedures have been respected and if the legal outcome therefore is correct. As Habermas puts it, "whether the demanding communicative presuppositions have been sufficiently met can only be judged from within the perspective of participants."¹²⁸. How does Habermas solve this circle? The answer is, by supplementing the discourse procedures with *judicial* procedures which guarantee "punctual, unambiguous and binding results"¹²⁹.

¹²⁵ Cf. *ibid*, p.475.

¹²⁶ "Wir müssen erklären, wie es im Prinzip möglich ist, daß sich staatsbürgerliche Moral und Eigeninteresse miteinander verflechten." *id.*, 475.

¹²⁷ "Towards a Communication Concept...", p.150.

¹²⁸ *id*, p. 150.

¹²⁹ *id*.

Habermas concludes: "So the socially-binding character -- borrowed from the legal code -- of a result that has been achieved conforming to the prescribed procedures substitutes the guarantee of pure procedural rationality."¹³⁰. But this brings Habermas closer to the instrumental use of law ("law as a medium") than is perhaps comfortable. Recall Habermas' assertion that positive law on its own is not able to stabilize itself by its own operations:

Seen from a purely functionalist perspective, law is entirely absorbed both by the contribution it makes to the power code and by fulfilling the code-function of its own. Viewed in this manner the circular process involving positive law and secular power should be able to rely on its own operations to stabilize itself. *In fact this is not the case.* Rather, the validity of positive law becomes paradoxical and a gap in legitimation opens up. How can law that has since become positive law meet with normative recognition and serve as the legitimizing basis for political power despite the fact that the political legislator can decide to change it at any time? Legal positivism again and again failed to explain this problematic condition, or rather denied its existence. The paradoxical situation can, however, be explained by the fact that the constitutive conditions of the complex of law and politics are violated as soon as the law, placed at the totally arbitrary disposition of some political legislator, ceases to serve as a resource for justice¹³¹.

It now seems as if Habermas were left with two self-referential circles, the argumentative (= communicative) and the juridical (= instrumental), both being in need of each other in order to stabilize themselves and each other. How might this work?¹³².

¹³⁰ *id.*

¹³¹ *Ibid.*, p. 148.

¹³² Consider Habermas' assertion that "[t]he intertwining of both types of procedure triggers off a dialectical process in which positive law exceeds its own boundaries by the recursive application of the legal code." (*ibid.*, p.151).

It seems that the "internal connection between law and morality" is provided by the communicative element of law, transcending the borders of both. The communicative element is present when court decisions are submitted to the judgment of citizens:

The public character of the proceedings takes into account that the court's presumed impartiality is in the final instance subject to the check of the open interpretative community of citizens. Ideally, the expert discourse must not lose this reference to the legal public, for the argumentational steps in adjudication are not fully determined by positive law and depend on complementary considerations of both a moral and a political nature¹³³.

But does the complexity of contemporary societies really allow this? Do citizens understand and are they able to judge the expert discourse of law?

Habermas is quite realistic when he - this time speaking about politics - argues that under the conditions of complex societies these ideals have to be seen in more modest terms. He writes:

Given that in complex societies it is not possible to fulfill the demand for immediate participation, strict restrictions follow from the principle of popular sovereignty with regard to the selection, composition, business procedures and context of the representative bodies. A discourse by representatives satisfies conditions for equal participation at least indirectly to the extent that it remains open and sensitive to a public opinion arising from the grass roots, of a more or less informed, pluralist and spontaneous public sphere.¹³⁴

¹³³ "Towards a Communication-Concept...", p. 150.

¹³⁴ *id.*, p. 153.

To invoke the paradoxical structure of the argument once more, one might say that on the one hand Habermas must presuppose a political culture and a legal public which is interested and capable of understanding and discussing the matters, while on the other he must not make strong claims in this respect. In order to avoid the demon of a self-referential legal system he must demand of the critical public considerable *virtue* thereby running the risk of "overburdening" it. It appears to us that the feasibility of his project depends to a great deal on the success of this balancing act.

4. Paradoxes and Social Loss

According to our basic intuition, any theory which aims at defining the right over the good without committing itself to some good, turns out to be self-contradictory or at least inconsistent. This inconsistency takes the form of a paradox. Habermas, working with a far more complex inter-disciplinary theory than that of Rawls, succeeds to defer the paradox by introducing new distinctions branching out into the fields of speech analysis, psychology, anthropology, social development theories and so on. But the paradox reappears, again and again. And like Rawls and Kymlicka, Habermas simply goes on, offering up the call to the faithful who will rally to the defence of the impartial "moral point of view".

The first instance of the paradox occurs when Habermas privileges some forms of life while claiming impartiality. He

resolves it by introducing the conceptual innovation of the (U) principle, claiming that this emerges only in modern ("post-traditional") societies. This leads him to a position which interprets the modern as the universal¹³⁵, a new paradox. The resolution of this paradox comes through the introduction of solidarity as the obverse of justice. But here, the burden rests totally on assumptions of human nature, whereby Habermas claims a "tight connection" between the care for the well-being of the neighbour as well as for the common welfare. The notion of solidarity is expanded so that all humans may fall within it. In order to make *this* plausible, the "community of speakers" (*Sprachgemeinschaft*) is *conceptualized* in purely cognitivist terms. But in so doing, the theory risks losing contact to the social realities of radical value conflicts in contemporary societies. If Habermas takes his assertion that *questions of the good life are not amenable to theoretically binding discussions*¹³⁶ seriously, this would entail the existence of a plurality of goods unlikely to be harmonized.

Confronted with "neo-conservative" reproaches that his theory would amount to a "knowing better" or even an attempt to force upon unhappy subjects the knowledge of their real interests, Habermas answers that in his view the task of the

¹³⁵ According to Habermas, the potential of rationality in the life-world amounts to the following:

- (1) The universal is the rational
- (1a) The rational is universal
- (2) The rational is modern
-
- (3) The universal is modern

¹³⁶ "Gerechtigkeit...", p. 304.

philosopher is only to found the principle of universalization. Once this "rule of argumentation" is found, this does not prescribe any normative substance. Instead, all substantive questions must depend on (real or hypothetical) discourses. Here the philosopher just takes part in the discourse, but only as a concerned person, perhaps even as an expert, but never as the conductor of the discourse. It is significant that Habermas considers Rawls' suggestions concerning a just society as belonging to the latter. That is to say, they are not universalizable but just the private opinion of John Rawls who wants to set them into practice. According to Habermas, Rawls just has to participate in debates as a citizen - just like everyone else¹³⁷. To make sure that morality is in fact universal and not a reflection of particularistic views or interests, Habermas gives it a reformulation which relies on discourse ethics. This burdens him with the proof to demonstrate that discourse ethics really is universal.

Habermas himself admits that there is a justifiable scepticism with respect to discourse ethics on account of the hermeneutical criticism that the principles of discourse ethics cannot regulate the problems of their own application¹³⁸. The hermeneutical criticism has it that the application of rules calls for a practical prudence which has to join discourse ethics additionally. Discourse ethics only works if it is supported by a *capacity* ("Vermögen") to link moral judgements to local

¹³⁷ Habermas, "Moralität...", p. 232.

¹³⁸ "Moralität...", p. 229.

agreements¹³⁹. Habermas' response to this is that one has to change perspectives. The hermeneutical argument is only true if an observer examines the situation. As soon as this perspective is given up and the observer becomes a participant taking part in discussions in the first person, he or she cannot avoid the claims of a universalistic morals without ... "performative contradiction", a now famous argument which has been burdened not only with the tasks of defending the internal validity claims of speech acts, asking the critic-as-sceptic to yield to these claims or leave the discussion, but also with ... the task of refuting objections from (presumably psychologically under-developed) critics who cannot take the step to the "moral point of view" through their preference for the lowlands of the ethical.

This does not seem to leave much room for the recognition that a theory of justice based on a principle of universalizability, *however much tempered by discourses of application* -- since both Günther and Habermas maintain that application discourses only deal with the application of norms, already validated in the discourse of justification -- cancels certain life forms which are considered worthy by their holders. Despite the fact that the heavily sociologically-grounded theory of communicative action has a higher conceptual capacity than Rawlsian liberalism in *identifying* the radical conflict of values in contemporary Western societies, it remains less sensitive than Rawls' theory to the fact that there is "no social world without loss - that is, no social world that

¹³⁹ id.

does not exclude some ways of life that realize in special ways fundamental values"¹⁴⁰.

Prima facie, such a statement can be brushed off as a political truism - afterall "someone always loses...". But in the adoption of a stronger, developmental thesis of rationality, the use of a discourse of "pathologies", and the teleological commitment to the emancipatory potential of "modernity", Habermas misses what Rawls is beginning to recognize: that there is no sure answer to whether a life form "corresponding" to one rejected under a liberal theory of justice given one set of historical conditions, "would be viable under other historical conditions, and whether its passing is to be regretted"¹⁴¹, a question which goes to the heart of impartiality, and its "cutting edge" of civil disobedience. Unlike Habermas, Rawls has recognized that the optimistic view that "only unworthy forms of life lose out in a just constitutional regime" is "mistaken"¹⁴².

It would be too much to expect of Rawls that he revoke his theory of justice on this account. But it is heartening to see that in grappling with the problem of social loss, Rawls comes round to increasingly more transparent renditions of the paradox of the priority of the - impartial (?) - right. He states that:

I should have gone on explicitly to reject the idea ... that only unworthy forms of life lose out in a just constitutional

¹⁴⁰ Rawls, "PRIG", p.265.

¹⁴¹ "PRIG", p.266.

¹⁴² "PRIG", p.266, fn.25.

regime. That optimistic view is mistaken. It may still be objected by those who affirm the conceptions [of the good] that cannot flourish that political liberalism does not allow sufficient space for them. But there is no criterion for what counts as sufficient space except that of a reasonable and defensible political conception of justice itself.¹⁴³

What Habermas may yet have to offer, remains to be seen.

¹⁴³ "PRIG", p.266, fn.25.



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